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UNITED STATES CIVIL SERVICE COMMISSION

FEDERAL PERSONNEL MANUAL SYSTEM

LETTER

Washington, D.C. 20415

FPM LETTER NO. 792-7

June 17, 1974

SUBJECT: Federal Civilian Employee Alcoholism and Drug Abuse Program

Heads of Departments and Independent Establishments:

1. Public Law 92-255 approved March 21, 1972, provides that the Civil Service Commission shall be responsible for developing and maintaining, in cooperation with the Director of the President's Special Action Office for Drug Abuse Prevention and with other Federal agencies and departments, appropriate prevention, treatment, and rehabilitation programs and services for drug abuse among civilian employees.
2. In furtherance of their responsibilities under Public Law 92-255, the Special Action Office has issued regulations, 38 Federal Register 33744 (December 6, 1973), interpreting section 408 of that statute, "Confidentiality of patient records." The provisions of section 408 and the interpreting regulations are an integral part of the Federal Civilian Employee Drug Abuse Program; a copy of the regulations is attached.
3. Prior to developing this instruction, CSC Bulletin No. 792-8 of October 5, 1972, asked for the benefit of agency thinking and experience in the drug area. The responses received were considered in forming policy and program direction.
4. This instruction supplements and amends FPM Letter No. 792-4 of July 7, 1971, Subject: Federal Civilian Employee Alcoholism Programs.
5. By November 1, 1974, the head of each department and agency with Federal civilian employees shall, after appropriate consultation with labor organizations, supplement or amend their Federal Civilian Employee Alcoholism Program instruction, in accordance with the attachments. Provisions of the revised policy statement shall be made available to all employees.

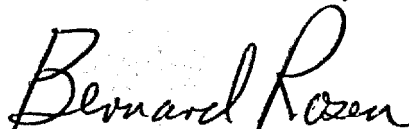
Regional Office or Bureau of Retirement, Insurance, and Occupational
INQUIRIES: Health, Occupational Health Division, 63-27672 or Code 101, ext. 27672

CSC CODE 792 - Health Program

DISTRIBUTION: FPM

A copy of departmental and agency headquarters level instructions implementing this instruction should be forwarded to the Bureau of Retirement, Insurance, and Occupational Health by November 8, 1974.

By direction of the Commission:


Bernard Rosen
Executive Director

Attachments

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I. Background

Section 413 of Public Law 92-255 reads in part as follows:

"(a) The Civil Service Commission shall be responsible for developing and maintaining, in cooperation with the Director and with other Federal agencies and departments, appropriate prevention, treatment, and rehabilitation programs and services for drug abuse among Federal civilian employees. Such policies and services shall make optimal use of existing governmental facilities, services, and skills.

* * *

"(c)(1) No person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the ground of prior drug abuse.

"(2) This subsection shall not apply to employment (A) in the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, or any other department or agency of the Federal Government designated for purposes of national security by the President, or (B) in any position in any department or agency of the Federal Government, not referred to in clause (A), which position is determined pursuant to regulations prescribed by the head of such department or agency to be a sensitive position.

"(d) This section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in employment."

Section 408 of Public Law 92-255 is an integral part of the Federal Civilian Employee Drug Abuse Program:

"(a) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function authorized or assisted under any provision of this Act or any Act amended by this Act shall be confidential and may be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

"(b)(1) If the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained gives his written consent, the content of such record may be disclosed

(A) to medical personnel for the purpose of diagnosis or treatment of the patient, and (B) to governmental personnel for the purpose of obtaining benefits to which the patient is entitled.

(2) If the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, does not give his written consent, the content of such record may be disclosed as follows:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management or financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

"(c) Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

"(d) The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.

"(e) Except as authorized under subsection (b) of this section, any person who discloses the contents of any record referred to in subsection (a) shall be fined not more than \$500 in the case of a first offense, and not more than \$5,000 in the case of each subsequent offense."

II. Purpose

This issuance supplements and amends FPM Letter No. 792-4 of July 7, 1971, Subject: Federal Civilian Employee Alcoholism Programs, and transmits to the heads of department and agencies the guidelines for implementation of Public Law 92-255, and the interpreting regulations issued by the Special Action Office for Drug Abuse Prevention, in 38 Federal Register 33744 (December 6, 1973).

III. Implementation

By November 1, 1974 all agencies with Federal civilian employees shall supplement or amend their Federal Civilian Employee Alcoholism Program instructions in accordance with these guidelines.

IV. Policy

As an employer, the Federal government is concerned with the accomplishment of agency missions and the requisite need to maintain employee productivity. When an employee's use of drugs interferes with the efficient and safe performance of his assigned duties, reduces his dependability or reflects discredit on the agency, Federal managers should take the action indicated in FPM Letter No. 792-4 of July 7, 1971. When Federal managers have good reason to believe that an employee's drug abuse problem also involves criminal conduct directed toward or potentially harmful to the person or property of others, an obligation may arise to report the facts known to law enforcement authorities. Such reports should be made through a management level at which the exercise of discretion is normally expected, and through which reports of other types of criminal activity are generally made.

V. Definition of the Drug Problem

A. Congress made the following findings in Section 101 of Public Law 92-255:

1. "Drug abuse is rapidly increasing in the United States and now afflicts urban, suburban and rural areas of the Nation.

2. "Drug abuse seriously impairs individual, as well as societal health and well-being:
3. "Drug abuse, especially heroin addiction, substantially contributes to crime.
4. "The adverse impact of drug abuse inflicts increasing pain and hardship on individuals, families, and communities and undermines our institutions.
5. "Too little is known about drug abuse, especially the causes, and ways to treat and prevent drug abuse.
6. "The success of Federal drug abuse programs and activities requires a recognition that education, treatment, rehabilitation, research, training, and law enforcement efforts are interrelated.
7. "The effectiveness of efforts by State and local governments and by the Federal Government to control and treat drug abuse in the United States has been hampered by a lack of coordination among the States, between States and localities, among the Federal Government, States and localities, and throughout the Federal establishment.
8. "Control of drug abuse requires the development of a comprehensive, coordinated long-term Federal strategy that encompasses both effective law enforcement against illegal drug traffic and effective health programs to rehabilitate victims of drug abuse.
9. "The increasing rate of drug abuse constitutes a serious and continuing threat to national health and welfare, requiring an immediate and effective response on the part of the Federal Government."

B. Definitions

For the purposes of administering the Federal Civilian Employee Alcoholism and Drug Abuse Program, the following definitions supplement those provided in FPM Letter No. 792-4, and Section 1401.01 of the attached regulations:

Drug Abuse -- A health problem characterized by the use of a drug in a manner or to a degree which interferes with the individual's health, interpersonal relations, economic functioning, or societal standing.

Methadone -- A synthetic narcotic which is orally administered under medical supervision to a heroin addict to control withdrawal symptoms caused by abstinence from heroin, or to medically maintain him in a sufficiently stabilized condition to permit socially functional behavior.

Sensitive positions -- Only those which are designated as "critical-sensitive" in FPM Chapter 732.

VI. Program Guidelines

A. Program Support and Endorsement

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism - drug abuse program.

B. Policy Statements

Agencies shall issue policy statements which include the following declarations:

1. That the agency recognizes drug abuse as a treatable health problem.
2. That for purposes of the policy, drug abuse is defined as a health problem in which the employee's job performance is impaired as a direct consequence of the use of drugs.
3. That employees with a drug abuse problem will receive the same careful consideration and offer of assistance that are presently extended to employees having any other illness or health problem.
4. That, however, the agency does not condone employee drug activity which is contrary to law. When management has good reason to believe criminal conduct is directed towards or potentially harmful to the person or property of others, management's first obligation is to those persons or properties, and then to the employee involved.
5. That no employee will have his job security or promotion opportunities jeopardized by his request to designated personnel for counseling and referral assistance, except as limited by Section 413(c)(2) of Public Law 92-255 relating to sensitive positions.
6. That the confidential nature of medical/counseling records of employees with drug abuse problems will be preserved in accordance with Section 408 of Public Law 92-255 and the implementing regulations.
7. That sick leave will be granted for the purpose of treatment or rehabilitation as with any other health problem.
8. That employees who suspect they may have a drug abuse problem, even in the early stages, are encouraged to voluntarily seek counseling and information on a confidential basis by contacting the individual(s) designated to provide such services.

C. Relationships with Labor Organizations

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism - drug abuse program.

D. Program Direction

The philosophy, functions, and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism - drug abuse program.

E. Role of the Personnel Office

The philosophy, functions, and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism - drug abuse program.

F. Community Resources

The philosophy, functions, and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism - drug abuse program.

G. Role of the Supervisor

The following replaces Section VI-G of FPM Letter No. 792-4, on the "Role of the Supervisor."

1. Key Role of the Supervisor

Legitimately, supervisors have fairly explicit expectations of their employees in terms of job performance and behavior. When employees fail to fulfill these expectations, supervisors have both the right and the duty to confront them with the deficiencies, and to provide them with opportunities to correct the problems, regardless of their genesis. Dealing with poor performance is a basic supervisory responsibility. Early intervention will generally be most helpful in returning employees to productivity. When alcohol or drug problems are underlying factors in poor performance, timely intervention may also lead to early, even life - saving identification and treatment of the health problem.

In summary, supervisors should:

- a. Be alert, through continuing observation, to changes in the work and/or behavior of assigned employees.

- b. Document specific instances where an employee's work performance, behavior or attendance fails to meet minimum standards or where the employee's pattern of performance appears to be deteriorating.
- c. Advise medical and/or counseling staff of the employee's problem, and the possibility of a referral to them. Supervisors must be able to describe behavior to the counseling staff but should not attempt to diagnose or draw conclusions. This is a medical and/or counseling responsibility.
- d. Conduct an interview with the employee focusing on poor work performance and inform the employee of available counseling services in the event poor performance is caused by any personal or health problem.
- e. If the employee refuses help, and performance continues to be unsatisfactory, provide a firm choice between accepting agency assistance through counseling or professional diagnosis of his problem, and cooperation in treatment if indicated, or accepting consequences provided for unsatisfactory performance.

Supervisors should not discuss the possibility of a drug or alcohol problem with an employee, except:

- a. When an employee does not appear to be in full control of his faculties.

In such an instance, the supervisor should immediately inquire about his physical condition but should be aware that appearance symptoms usually related to alcohol or drug use can apply to other health problems as well. Information on such cases should be relayed to the medical staff and the employee should be referred to the medical department for diagnosis and emergency treatment. Where indicated, the employee should be further referred to a private physician or community health services. In the event such cases ultimately are determined to have stemmed from abuse of alcohol or drugs, supervisors should discuss the facts of the situation with the employee and refer him for counseling.

- b. When an employee is apparently involved in illegal activities related to drugs.

Consistent with the policy expressed in Section IV of this instruction, the following steps are appropriate:

(1) When management has good reason to believe an employee has engaged in criminal conduct directed exclusively toward himself, supervisors shall inform the employee of the facts known, similarly apprise the counselor, and refer the employee for counseling. Supervisors should be careful not to elicit or entertain from the employee any specificity or detail as to the nature of any illegal activity or conduct involved.

(2) When management has good reason to believe an employee is involved in criminal conduct directed toward or potentially harmful to the person or property of others--such as selling drugs or stealing to support a drug habit--supervisors have an obligation first to these persons or properties, and then to the employee. They may therefore first report the facts known to law enforcement authorities; such reports should be made through a management level at which the exercise of discretion is normally expected, and through which reports of other types of criminal activity are generally made. Subsequently, supervisors should take the action indicated in (1) above, first insuring that this action will not interfere with the efforts of law enforcement authorities.

In summary, agency managers should be made aware that Public Law 92-255 requires agencies to maintain treatment and rehabilitation programs; it does not charge agencies or their personnel with any responsibility for seeking out information on illegal employee activities for the purpose of reporting it to law enforcement authorities. Neither, however, does the statute justify supervisory failure or, indeed, failure of any Federal employee to report such activity to responsible authorities, when it is directed against or potentially harmful to the person or property of others.

2. Development of Supervisors

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism - drug abuse program.

H. Role of the Medical Department

1. Emergencies

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism - drug abuse program.

2. Counseling

As indicated in FPM Letter No. 792-4, appropriate counseling must be available from medical personnel as well as the personnel designated under this program to perform such a function,

a. Confidentiality

Section 408 of Public Law 92-255 and the attached implementing regulations provide specific requirements for maintaining the confidentiality of patient information. All persons performing a drug abuse prevention function (as defined in the attached regulations) are subject to these provisions, and subject to the stated penalties for violating them. All personnel designated or expected to perform a drug abuse prevention function should be made thoroughly familiar with Section 408 and the attached regulations, and the importance of adhering to them should be impressed upon them.

In addition, any other agency-appointed counselor (regardless of his area of program responsibility), who provides counseling to the employee in regard to drug abuse is, performing a drug abuse prevention function. Such persons, who are not designated by their agencies to perform drug abuse prevention functions, should not continue such drug counseling; they are nevertheless bound by the above-referenced confidentiality requirements.

Thus, if a counselor in another program - - such as Equal Employment Opportunity or Selective Placement - - is advised by an employee of his drug problem, that counselor should:

- (1) immediately refer the employee to designated personnel for counseling regarding his drug problem,
- (2) adhere to the above-referenced confidentiality requirements, which include protection of even the employee's identity, and
- (3) release drug-related information on the employee only upon his written permission and only in accordance with the provisions of the law and regulations.

Agencies should impress upon all counseling personnel their responsibilities under this section, and inform them of the penalties under the law for violation.

(b) Discussion of illegal activities

Counseling persons who have drug problems may sometimes involve discussion of their illegal activities. Personnel performing a

drug abuse prevention function shall not disclose such information to law enforcement authorities, and should not seek to elicit information relating to crimes or criminal conduct from their clients.

However, no counselor is bound to accept as a client an individual who persists in discussing illegal activities, Therefore, if information is disclosed on:

- (1) Planned illegal activity against others, or
- (2) Specificity and detail of past illegal activity against others

The counselor should consult legal counsel, where available, regarding his duty/responsibility, and should advise the employee that continued disclosure will result in termination of counseling services. Should termination of services occur, the counselor shall, if the employee was referred by management, advise management of the termination of services.

VII. Relationship to Disciplinary Actions

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism-drug abuse program. However, the attached regulations must also be adhered to; specifically, in a disciplinary situation, they permit a drug abuse prevention function to release information on an employee only in summary form and only with the employee's written consent.

VIII. Records and Reports

1. Maintenance of Records on Individuals

a. General Rules

FPM Letter No. 792-4 provides that medical records of employees with drinking problems be accorded the same confidentiality as all other medical records.

However, the use, maintenance and disclosure of medical/counseling records, which include information on drug abuse, are governed by the requirements of the previously referenced law and regulations.

b. Fitness-for-duty and pre-employment examinations

Public Law 79-658 of August 1946, (now codified in 5 U.S.C. 7901) and Bureau of the Budget Circular A-72 of June 1965, establish the policy that the health fitness of Federal employees for efficient performance of their assigned work is an important element in a

progressive personnel management system and in effective administration of Federal programs. Pre-employment and fitness-for-duty examinations are two mechanisms available to management for ensuring the health fitness of employees. The conducting of such examinations and subsequent release of information are not subject to the requirements of either Public Law 92-255 or the previously cited regulations; any drug related information developed in these two examinations will be accorded the same confidentiality provided under existing guidelines for other information developed in these types of examinations.

IX. Use of Sick Leave

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism-drug abuse program.

X. Expenses of Rehabilitation

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism-drug abuse program.

XI. Eligibility for Disability Retirement

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism-drug abuse program.

XII. Employment Considerations

The philosophy and requirements of FPM Letter No. 792-4 of July 7, 1971, apply to the combined alcoholism-drug abuse program.

Title 21—Food and Drugs

**CHAPTER III—SPECIAL ACTION OFFICE
 FOR DRUG ABUSE PREVENTION**

**PART 1401—CONFIDENTIALITY OF DRUG
 ABUSE PATIENT RECORDS**

In the FEDERAL REGISTER of November 17, 1972 (Vol. 37, No. 223, pages 24636-24639), a new Part 401 was added to Title 21 of the Code of Federal Regulations entitled "Confidentiality of Drug Abuse Patient Records." (37 CFR 401). This part was promulgated as an interpretative regulation to deal comprehensively with both substantive and procedural problems which had arisen under section 408 of Public Law 92-255 (21 U.S.C. 1175), the Drug Abuse Office and Treatment Act of 1972.

By order published in the FEDERAL REGISTER on September 24, 1973 (38 FR 26111), Part 401, Chapter III of Title 21 of the Code of Federal Regulations was redesignated as Part 1401, Chapter III of Title 21 and §§ 401.01 through 401.73 therein were redesignated as 1401.01 to 1401.73, respectively. Accordingly, all references and changes herein relate to the numbered sections as redesignated rather than the numbered sections as originally published.

To provide information necessary to aid the Director of the Special Action Office for Drug Abuse Prevention in determining whether this regulation should be amended, revoked, or reissued, interested persons were invited to submit written data, views, and arguments. Numerous comments, suggestions, and recommendations were received from professional and other organizations and individuals as well as known authorities in the field of drug abuse treatment and rehabilitation. Without exception, the comments supported the underlying policy of protecting the privacy of patients in federally authorized or supported drug abuse prevention programs as a necessary step in reducing the incidence of drug abuse in our society.

The Special Action Office has given serious consideration to all of the comments, suggestions, and recommendations. Many of them could not be adopted without changes in section 408 of the act. Several were based on a misconception of the regulations and required no changes. Others raised questions regarding certain sections of the regulation which required clarification or changes. The Director has determined that all of the amendments, which are hereinafter set forth, are necessary or desirable in furtherance of the Government's policy of securing the privacy of patient records as an important part of its program of minimizing the adverse social consequences of drug abuse.

A summary review of the comments and recommendations and the action taken with respect to each are set forth below, followed by the full text of the regulation as revised.

1. Definition of drug abuse prevention function. Through inadvertence, the definition of "drug abuse prevention function authorized or assisted under provisions of the act or any act amended by the act" as appearing in § 1401.01 of the regulations, embraced only those programs which (1) are conducted by an agency or department of the United States Government or (2) are conducted by virtue of a license, permit, or other authorization from any such agency or department. It was intended that this definition also should include any drug abuse prevention function which is supported by any agency or department of the United States pursuant to Federal law. Section 1401.01 is so amended.

2. Definition of medical personnel. Under § 1401.01(g) the definition of "medical personnel" includes physicians, nurses, psychologists, counsellors, and supporting clerical and technical personnel. A recommendation has been made that this definition be clarified with respect to social workers and staff members in training positions. Section 1401.01(g) has been amended to make it clear that these persons are included in the definition, as well as to explicitly include financial and administrative personnel such as those processing insurance claims directly related to treatment.

3. Definition of records. Section 408(a) provides that: "Records of the identity, diagnosis, * * * are to be kept confidential. The comment has been made that this section does not refer to "communications" and the question has been raised as to whether communications and other types of information were intended to be protected against unauthorized disclosures. While it is true that section 408 does not refer to "communications," it is obvious that the policy of the section would be defeated if drug treatment personnel were allowed to disclose communications or other unrecorded information received from the patient, whether or not they were permitted to disclose the records based upon such communications. Any other interpretation would defeat the principal objective of section 408 in attempting to encourage drug addicts to volunteer in a drug treatment program. We have construed section 408 as applying not only to "records" but also to all communications and other information relating to the patient's identity, diagnosis, prognosis, or treatment in a federally authorized or supported drug abuse prevention activity. Therefore, if information would be treated as confidential if recorded, it should receive the same protection if not recorded. Paragraph (h) of § 1401.01 has been added to express this interpretation.

4. Applicability prior to March 1, 1972. An inquiry has been received as to whether section 408 applies to records in existence prior to the publication of the regulations or the enactment of the statute. Section 408 of P.L. 92-255 applies to records "maintained in connection with the performance of any drug abuse prevention function authorized or assisted under any provision of this act or any act amended by this act." This is implemented by § 1401.02 which makes section 408 applicable to records made on or after March 21, 1972, the date of enactment of P.L. 92-255. Therefore, provisions of section 408 would apply to any records of a patient generated after March 21, 1972. Also, they would apply to all records of a patient generated prior to March 21, 1972, provided he was an active participant in a treatment program on that date and such participation represented a single continuous program. Therefore, the record of a patient actively participating in a federally authorized or supported drug abuse prevention program on March 21, 1972, should be considered as confidential in its entirety even though part of it was generated immediately prior to that date. Section 1401.02(a) of the regulations is amended to clarify this point.

5. Disclosure to governmental personnel for purposes of obtaining benefits. Section 1401.23 provides for disclosure with the patient's consent for the purpose of obtaining public benefits. A recommendation has been made that limitations should be set upon the nature and extent of the information legitimately needed to qualify for benefits. In effect, the patient already has the right to limit the extent of disclosure for purposes of obtaining these benefits. Section 1401.06 limits disclosure to information necessary in the light of the need or purpose for the disclosure and under § 1401.21, the patient in granting consent, must specify the type of information to be disclosed. In view of the restrictions in these two sections, no further limitations are deemed necessary in § 1401.23.

6. Disclosure in connection with judicial or administrative proceedings. Section 408(b)(1)(B) permits a patient to consent to disclosure to governmental personnel for the purpose of obtaining benefits to which the patient is entitled. Numerous questions have been raised concerning the authority of a patient to consent to a disclosure in a judicial or administrative proceeding which involves an issue relating to a patient's claim, benefit, or a right to which the patient is entitled. Under § 1401.24, similar disclosures are authorized in connection with parole, probation, or suspension of prosecution. To clarify this question, a new paragraph (d) has been added to § 1401.23. This section provides that whenever a patient is entitled to any claim or other benefit which is an issue in any judicial or administrative proceeding and some part or all of his drug abuse record is relevant to, and necessary in support of, such claim or benefit, such patient may consent to disclosure of his record to the extent needed to support such claim or other benefit. When any such disclosure is authorized, the court, administrative tribunal, or other governmental body or official should be alerted as to the need to maintain confidentiality and to avoid, to the extent practicable, any further disclosure of the record or the patient's identification.

7. Evaluation of employment data for purposes of rehabilitation. Section 408(b)(1)(B) of Public Law 92-255 (21 U.S.C. 1175(b)(1)(B)) permits disclosure with the patient's consent "to government

personnel for the purpose of obtaining benefits to which the patient is entitled." Section 101 of the Act contains an express finding that the success of Federal drug abuse programs and activities requires a recognition that education, treatment, and rehabilitation are inter-related. Section 103(b) defines "drug abuse prevention function" as any program relating to education, training, treatment, rehabilitation or research and includes "any such function even when performed by an organization whose primary mission is in the field of drug traffic prevention functions or is unrelated to drugs." The Director of the Special Action Office has determined that employers, employment agencies and employment services which have demonstrated their willingness to assist in the employment of persons who are present or past patients in a drug abuse treatment or rehabilitation program are performing an essential drug abuse prevention function. Section 1401.26 now provides that an evaluation of patient's progress or status in a treatment program may be furnished to an employer but only after the patient has been employed or has been accepted for employment. This section is now revised to permit limited disclosures to employers and employment agencies and services which have agreed to assist such patients, both present and past, in obtaining gainful employment. Disclosure is permitted only with the patient's consent and is limited to an evaluation of such patient's status or progress in treatment or rehabilitation program. Section 1401.26 is amended accordingly.

8. *Consent of a minor patient to disclose to parents.* Two questions have been raised concerning the disclosure of the records of a minor patient to his parents. The first question concerns the authority for such disclosure. The second question inquires as to whether a minor patient is authorized to give consent. The answer to the first question is set forth in § 1401.26(b) of the regulations. This section provides that information in the nature of a general evaluation of a patient's present or past status in a treatment program may be furnished to members of the patient's family if, in the judgement of a qualified physician or counsellor, such information would be helpful in the treatment or rehabilitation of the patient and the patient makes a written request that such information be furnished. It should be noted that this provision is limited to the disclosure of a mere evaluation of the patient's status or progress in a treatment program and also can only be done if requested by the minor.

Regarding the second question, whether a minor would have authority to consent to disclosure where otherwise permitted, the answer to this question would depend upon local law in view of the fact that section 408 establishes no specific rule on the question. Of course, if the minor is considered incompetent under local law, consent can then be rendered by a guardian or conservator or

if deceased by his personal representative as provided in § 1401.04. However, this would apply only in cases where disclosure is otherwise authorized with patient's consent under section 408 or the regulations.

Neither of these comments require any change in the regulations since they have been dealt with already to the extent permissible under law. Therefore, no revisions are considered necessary.

9. *Health and other insurance claims.* There have been numerous instances in which patients, or former patients in a drug abuse prevention program, have encountered difficulty in supporting their claims for reimbursement or payment under health or other insurance arrangements or programs under which they are beneficiaries. A major cause of this difficulty is attributable to the reluctance of drug abuse programs to disclose the necessary information from the patient's record to support the claim notwithstanding the fact that any such payment or reimbursement is directly related to the patient's treatment, which is part of the definition of "drug abuse prevention function" in section 103(b) of Public Law 92-255. Therefore, in order to clarify the law governing records pertaining to such claims, a new § 1401.27 has been added specifically authorizing a limited disclosure of information in a patient's record with his consent to the extent necessary to support a claim for payment or reimbursement under a health or other insurance program for the benefit of the patient and under circumstances in which such claim is related to the performance of a drug abuse prevention function, i.e., treatment or rehabilitation.

10. *Disclosure to a registry.* Section 1401.43 of the regulations permits disclosure among programs and to a registry serving such programs. It has been suggested that the regulations should spell out the extent of supervision necessary for the maintenance of a registry. Otherwise, it has been argued, the potential for abuse of a centralized listing of persons so closely affiliated with illicit behavior could undermine the basic policy of confidentiality in section 408. Section 1401.43 is intended to permit the operation of a central intake facility to prevent simultaneous registration in more than one methadone program and to assure that potential patients are made aware of vacancies in any participating programs. Such a registry is simply an extension of the treatment program and since the registry is prohibited from making any disclosure except as authorized under section 408 and the regulations, there is adequate protection of the privacy of patients against unauthorized disclosures. Moreover, the information which can be collected or retained by such a registry is strictly limited to that which is necessary to the performance of its functions. Therefore, the Special Action Office deems it unnecessary to specify additional limitations at this time.

11. *Research, audits and program evaluations.* Referring to the fact that sec-

tion 408(b)(2)(B) authorizes disclosure without the consent of the patient to "qualified personnel" for the purpose of conducting scientific research, management or financial audits or program evaluations, it was noted that § 1401.44 of the regulations does not offer any guidance as to what persons come under the classification of "qualified personnel."

"Qualified personnel" under section 408(b)(2)(B) of the act applies principally to two groups. The first group includes personnel making management or financial audits and program evaluations. Except in special circumstances, these functions would be performed only by Federal, State, or local governmental licensing, regulatory, or accrediting agencies which have oversight or other official responsibility with respect to such functions. The second group includes personnel conducting scientific research or evaluations. This group would include principally individuals, groups or organizations having primary responsibility for the collection, evaluation, and dissemination of information in connection with a scientific or program evaluation study for which actual drug abuse data is needed. Paragraph (b) has been added to § 1401.44 to define "qualified personnel" as used in section 408(b)(2)(B).

12. *Disclosure to State agencies as required by statute.* Several comments have been made that State statutes, in many instances, require a disclosure to the State Public Health Department or other State boards or agencies to carry out some local policy objective, such as a check on doctors to determine possible abuse in the treatment of drug addicted patients. Apparently, some doubt has been expressed that section 408 and the regulations do not cover this situation. Attention is directed to § 1401.44 which authorizes disclosure without the consent of a patient to qualified personnel for purposes of conducting scientific research, management audits, financial audits, or program evaluations. To the extent that personnel of State agencies or boards are serving some legitimate objective related to one of the purposes indicated in this section, disclosure to such personnel would seem to come within the intent of section 408(b)(2)(B) of Public Law 92-255 and § 1401.44 of the regulations. Attention is specifically invited, however, to the fact that section 408(b)(2)(B) protects the patient in that any qualified personnel receiving patient information is prohibited from disclosing, directly or indirectly, the identity of any individual patient. If any State law provided otherwise, the Federal policy as set forth in section 408(b)(2)(B) would prevail. Consequently, if the State personnel involved meet the qualifications test by reason of conducting scientific research, management or financial audits or program evaluations and they remain subject to the policy in section 408 with respect to further disclosure, in most instances disclosure to such personnel is authorized. However, a program director need not authorize a disclosure under section 408

(b) (2) (B) If he does not believe that the patient's rights of confidentiality are respected. It is believed, therefore, that a reasonable interpretation of this section will accommodate most problems that might arise thereunder and therefore no changes are being made at this time.

13. *Disclosure in court proceedings—court orders.* Several questions have been raised regarding disclosures in court proceedings and the procedure and authority for making such disclosures in certain situations.

(a) One comment referred to a situation in which the drug addiction of the husband was a ground for divorce and therefore was relevant to a proceeding for divorce initiated by the wife. Assuming other evidence is not available, the proper procedure in such a case would be to obtain a court order under section 408(b) (2) (C) based upon a showing of good cause. This would be done under § 1401.72 of the regulations and the court should be asked to receive the evidence in camera.

(b) Another question related to the lack of a requirement of notice to the patient and an opportunity to participate in a court proceeding under section 408 (b) (2) (C) of the act. This question raised the issue that due process should require an opportunity to participate in what may be a critical stage of a criminal proceeding, otherwise the proceedings would be ex parte with only the applicant and the judge present. The further comment is made that the regulations contain no definitional guidance as to what constitutes the "public interest" in the granting of a court order and recommends that more specific guidance be included in any revision of the regulations. Attention is invited to § 1401.72 which sets forth information which should be included in an application for a court order under section 408(b) (2) (C) of the act. This information is intended to assist the court in making a finding as to whether disclosure in any particular case would be in the public interest. Until there is compelling evidence of a need to provide further clarification, the Special Action Office deems it undesirable to make additional changes on these points.

(c) A related comment suggests that section 408 requires that the court consider the possible injury to the patient and to the physician-patient relationship in any proceeding to determine whether an order should be granted in the public interest. It is indicated that in any such proceeding the identity of the patient will be disclosed and information concerning him as a patient will be the subject of discussion at the hearing and consequently in effect would constitute a damaging disclosure in violation of the intent of section 408. This is a valid comment but it assumes that the patient's identification will be disclosed at the hearing. Counsel, as well as the court, should be alerted to the dangers of such disclosure in order to avoid the identification of a specific patient as the subject of the hearing. This can be done by an agreement between counsel and the court that the patient's name will not be identified in

the proceedings. It is hereby found that good cause exists to make the amendments in the regulation as described above. It is hereby determined that good cause exists to make these amendments effective immediately, that such amendments constitute interpretative rules within the meaning of section 553(b) of title 5, United States Code, and accordingly that notice and public procedure thereon prior to their effectiveness are not required by law. Therefore, it is ordered that title 21, Chapter III, Part 1401 of the Code of Federal Regulations be amended accordingly and as amended will read as hereinafter set forth, effective upon publication in the FEDERAL REGISTER.

By order of the Director of the Special Action Office for Drug Abuse Prevention
November 29, 1973.

GRASTY CREWS II,
General Counsel.

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provisions of this Part are authorized under sections 213, 221, 222, and 408 of the Drug Abuse Office and Treatment Act of 1972 (Public Law 92-255; 21 U.S.C. 1122, 1131, 1132, and 1175), and other relevant provisions of law.

GENERAL PROVISIONS

§ 1401.01 Definitions.

For the purposes of this part, the following words shall have the meanings indicated:

(a) The term "Act" means the Drug Abuse Office and Treatment Act of 1972 (Public Law 92-255) including such amendments thereto as may be in effect at the time the provision referring to it is applied.

(b) The term "Director" means the Director of the Special Action Office for Drug Abuse Prevention.

(c) The term "drug abuse prevention function" means any program or activity relating to drug abuse education, training, treatment, rehabilitation, or research, and includes any such function even when performed by an organization whose primary mission is in the field of drug traffic prevention functions (as defined in 21 U.S.C. 1103(c)), or is unrelated to drugs.

(d) The term "drug abuse prevention function authorized or assisted under any provision of the Act or any act amended by the Act" means any drug abuse prevention function—

(1) Which is conducted or supported, in whole or in part, by any department, agency, or instrumentality of the United States, or

(2) For the lawful conduct of which in whole or part any license, permit, or other authorization is required to be granted by any department or agency of the United States.

(e) The term "patient" means any person who is or has been interviewed, examined, diagnosed, treated, or rehabilitated in connection with any drug abuse prevention function and includes any person who, after arrest on a criminal charge, is interviewed and/or tested in connection with drug abuse preliminary to a determination as to eligibility to participate in a drug abuse prevention program with the approval of the court.

(f) The term "governmental personnel" means those persons who are employed by the U.S. Government, by any State government, or by any agency or political subdivision of either, and includes Veterans Administration personnel as described in § 1401.23(b).

(g) The term "medical personnel" includes physicians, nurses, psychologists, counselors, social workers, and supporting administrative, financial, clerical, and technical personnel.

(h) The term "records" as used in section 408(a) shall include communications and other information, whether recorded or not, relating to the identity, diagnosis, prognosis or treatment of a patient.

§ 1401.02 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to records or any part thereof made on or

after March 21, 1972 where such prior treatment is part of one continuous treatment activity still subsisting on that date.

(b) The provisions of section 408 of the Act (21 U.S.C. 1175) and the remaining provisions of this part do not apply to any interchange of records entirely within the Armed Forces, within those components of the Veterans Administration furnishing health care to veterans, or between such components and the Armed Forces, but otherwise such section and this part apply to any communication to or from any person outside the Armed Forces or such components of the Veterans Administration.

§ 1401.03 General rules regarding confidentiality.

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function shall be confidential, may be disclosed only as authorized by this part, and may not otherwise be divulged in any civil, criminal, administrative, or legislative proceeding conducted by any Federal, State, or local authority, whether such proceeding is commenced before or after the effective date of this part.

§ 1401.04 Incompetent or deceased patients.

In any case in which disclosure is authorized with the consent of the patient, such consent may be given by a guardian, conservator, or other court-appointed designee in the case of an incompetent patient, and by an executor, administrator, or other personal representative in the case of a deceased patient.

§ 1401.05 Security precautions.

(a) Appropriate precautions should be taken for the security of records to which this part applies. The succeeding paragraphs of this section set forth examples of such precautions, but these should be added to or may be modified in the light of individual circumstances.

(b) The file of each patient maintained in connection with the performance of any drug abuse prevention function should be marked "Confidential Patient Information," as should any record identifying an individual as a drug abuse patient, including photographs, fingerprints, reports of skin abrasions indicating drug use, or other documentation of patient identification.

(c) Each file drawer, cabinet, or other container in which such files are kept should be conspicuously labeled with a cautionary statement such as the following:

§ 1401.06 Extent of disclosure.

Any disclosure made under this part, whether with or without the patient's consent, shall be limited to information necessary in the light of the need or purpose for the disclosure.

DISCLOSURES WITHOUT COURT AUTHORIZATION AND WITH CONSENT OF PATIENT

§ 1401.21 Form of consent.

(a) Where disclosure is authorized with the consent of the patient, such consent must, except as otherwise provided, be in writing and signed by the patient. Such consent must state—

- (1) The name of the person or organization to whom disclosure is to be made,
- (2) The specific type of information to be disclosed, and
- (3) The purpose or need for such disclosure.

§ 1401.22 Disclosure to medical personnel.

With the patient's consent, disclosure to medical personnel is authorized for the purposes of diagnosis or treatment. The consent must be in writing and in the form prescribed in § 1401.21. All medical personnel to whom disclosure is made shall be subject to all of the rules on confidentiality as set forth in this part.

§ 1401.23 Disclosure to governmental personnel for purpose of obtaining benefits.

(a) *Benefits generally.* With the written consent of a patient, disclosure is authorized to governmental personnel for the purpose of obtaining benefits to which the patient is entitled. For the purposes of this section, benefits to which a patient is entitled include, but are not limited to, any welfare, medicare, or other public financial assistance authorized by Federal, State, or local law, the suspension of prosecution, the granting of probation or parole, public pension or retirement benefits, and any other benefit conferred by lawful authority.

(b) *Veterans benefits.* Disclosure may be made to Veterans Administration personnel for the purpose of determining a patient's eligibility for hospitalization, pension, or other veterans' benefits. For the purpose of this section, Veterans Administration personnel includes any personnel (whether or not employed or compensated by the Veterans Administration) authorized by the Veterans Administration to assist patients in the preparation and submission of their claims.

(c) *Welfare benefits.* Where treatment for drug abuse has been made a condition to the granting or continuation of a welfare or other public benefit, disclosure is authorized to governmental personnel responsible for the administration or determination of such benefits.

judicial or administrative proceedings. In any proceeding before a court, an administrative tribunal, or other governmental body or official having authority to approve or disapprove, or to recommend approval or disapproval, of a claim or other benefit to which a patient is entitled and all or some part of such patient's drug abuse record is relevant and necessary to the determination of such claim or other benefit, such patient may consent to, and authorize the disclosure of such record or portion thereof deemed necessary to support such claim or benefit. When any such disclosure is authorized, the court, administrative tribunal, or other governmental body or official should be alerted as to the need to maintain confidentiality and to avoid, to the extent practicable, any further disclosure of the record or the patient's identification.

§ 1401.24 Disclosure in connection with parole, probation, or suspension of prosecution.

(a) In the case of a drug abuser charged with a criminal offense or who is subject to parole or other probationary action and who has agreed to participate in a drug abuse prevention treatment program as a condition of release from confinement or as a condition to the dropping, deferral, or suspension of charges or judgment, disclosure of such person's treatment records in connection with such program is authorized if the patient consents in writing to participate in such program and consents to disclosure in accordance with § 1401.21.

(b) Disclosure pursuant to this section shall be limited to the patient's attorney and to governmental personnel having responsibility with respect to the prosecution of the patient or for supervising his probation or parole.

§ 1401.25 Disclosure to legal counsel.

(a) In any situation in which disclosure is permitted with the patient's consent for one or more of the authorized purposes as stated in this part and the patient has secured the advice of legal counsel, disclosure may be made to the patient's attorney upon the written application of the patient endorsed by the attorney.

(b) In any situation in which a patient seeks the advice of legal counsel on the question of waiving confidentiality, disclosure is authorized to the extent necessary to render such advice, if written application for such disclosure is made by the patient and endorsed by the attorney.

§ 1401.26 Evaluation in connection with rehabilitation.

(a) Whenever a patient or former patient has been employed or is seeking employment and such employment is conditioned upon his status or progress in a treatment program, an evaluation of such status or progress by qualified medical personnel may be furnished to responsible employment services, agencies, or employers which have demon-

stated their willingness to employ or assist in the employment of, present or former drug abusers in a drug abuse treatment or rehabilitation program. Such organizations, agencies or employers shall maintain such evaluation as confidential and shall not disclose any part thereof to any other person or organization. Any disclosure under this section shall be subject to all of the following conditions:

(1) The request for such an evaluation must be in writing and signed by the patient.

(2) The request must identify the employer (or official therein) cooperating in the patient's rehabilitation program.

(3) The treatment organization must verify the authenticity of the request by telephone or other means of communication and ascertain the extent that the information is needed to verify the patient's treatment status.

(4) The information shall be limited to that reasonably necessary in view of the type of employment involved.

(5) No information may be furnished by a treatment organization unless the organization is satisfied on the basis of past experience or other credible information (which may in appropriate cases consist of a written statement by the employer) that such information will be used for the purpose of assisting in the rehabilitation of the patient and not for the purpose of identifying the individual as a patient in order to deny him employment or advancement because of his history of drug abuse.

(b) Information in the nature of a general evaluation of a patient's present or past status in a treatment program may be furnished to members of the patient's family if, in the judgment of a qualified physician or counsellor, such information would be helpful in treatment or rehabilitation of the patient and the patient makes a written request for such information to be furnished.

§ 1401.27 Disclosure for purposes of collecting health or other insurance claims.

A patient who has entered a drug abuse prevention program for diagnosis or treatment may for the purpose of such diagnosis or treatment (including the financing thereof) authorize the disclosure of information contained in his record to the extent necessary to support a claim for payment or reimbursement under a health or other insurance program carried by or in behalf of the patient and under which such patient is a beneficiary or participant. Any such disclosure shall be limited only to information which is directly relevant to, and necessary in support of, a claim for payment or reimbursement under such health or insurance program for the benefit of the patient and any information so disclosed remains subject to all of the restrictions of this part with respect to any further disclosure.

DISCLOSURE, WITHOUT CONSENT, OF INFORMATION AND WITHOUT CONSENT OF PATIENT

§ 1401.41 Disclosure without consent in general.

(a) Disclosure of a patient's records may be made without the consent of the patient and without authority of a court order as follows:

(1) To medical personnel to meet a medical emergency; and

(2) To qualified personnel for purposes of research, audits, or program evaluation.

§ 1401.42 Medical emergency.

Disclosure to medical personnel, either private or governmental, is authorized without the consent of a patient only when necessary to meet a bona fide medical emergency and only to the extent necessary to meet such emergency. For the purposes of this section a bona fide emergency may be considered to exist whenever competent medical authority has determined that the life or health of the patient involved may be impaired and medical treatment without the record could be detrimental to the patient's health. Where, for example, a person is incarcerated and claims to be a patient in a methadone treatment program, this claim may be verified by inquiry to the treatment center administering the program or to a registry such as is referred to in § 1401.43 in order to avoid overdose on the one hand, or the danger of untreated withdrawal on the other.

§ 1401.43 Records maintained in connection with chemotherapeutic treatment.

The communication of information relating to patient identity and dosage between or among programs approved by the Commissioner of Food and Drugs pursuant to § 130.44 of this title, or between such programs and a registry serving them, shall not be considered as a disclosure in violation of section 408(a) of the Act (21 U.S.C. 1175(a)), but any such information received by any such registry shall be fully subject to section 408 of the Act and to the provisions of this part.

§ 1401.44 Research, audits, and program evaluation.

(a) Disclosure without consent is authorized to qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner. Information so obtained may be used in enforcing lawful requirements imposed with respect to the operation of treatment programs employing controlled substances, but section 408(c) of the Act (21 U.S.C.

1175(c)) specifically prohibits the use of patient records to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient, except as authorized under a court order granted under section 408 (b) (2) (C) (21 U.S.C. 1175(b) (2) (C)). As used in this section, the term "qualified personnel" means persons whose training and experience are appropriate to the nature of the work in which they are engaged, and who are performing such work with adequate administrative safeguards against unauthorized disclosures.

CRIMINAL PENALTIES

§ 1401.51 Penalty for unauthorized disclosure.

Subsection (e) of section 408 of the Act (21 U.S.C. 1175) provides that except as authorized under subsection (b) of that section, any person who discloses the contents of any record referred to in subsection (a) of that section shall be fined not more than \$500 in the case of a first offense, and not more than \$5,000 in the case of each subsequent offense.

INTERPRETATION OF SECTION 408(b) (2) (C) IN RELATION TO OTHER LAWS

§ 1401.61 Relationship of section 408 (b) (2) (C) to other provisions of section 408 and to other legislation generally.

Section 408(b) (2) (C) of the Act (21 U.S.C. 1175(b) (2) (C)) empowers the courts, in appropriate circumstances, to authorize disclosures which would otherwise be prohibited by section 408(a). Both the positioning of this authority in the bill as initially passed by the Senate and the explicit crossreference in section 408(a) of the final Act make clear the congressional intent that section 408 (b) (2) (C) operate as a mechanism for the relief of the 408(a) strictures and not as an affirmative grant of jurisdiction to authorize disclosures prohibited by other provisions of law, whether Federal or State. By the same token, it should be noted that the authority which section 408(b) (2) (C) of the Act (21 U.S.C. 1175 (b) (2) (C)) confers on courts to issue orders authorizing the disclosure of records applies only to records referred to in section 408(a) (21 U.S.C. 1175(a))—that is, the records maintained by operating treatment or research programs, and not to secondary records generated by the disclosure of the 408(a) records to researchers, auditors, or evaluators pursuant to section 408(b) (2) (B).

§ 1401.62 Scope of orders; relationship to confidentiality provisions of Public Law 91-513.

(a) It is abundantly clear that section 408(b) (2) (C) was not intended to confer jurisdiction on any court to compel disclosure of any information, but solely to authorize such disclosure. An order or provision of an order based on some other authority, or a subpoena, or other appro-

appropriate legal process is required to obtain disclosure. To illustrate, if a person who maintains records subject to section 408 (a) of the Act is merely requested, or is even served with a subpoena, to disclose information contained therein which is a type whose disclosure is not authorized under section 408 of the Act or any of the foregoing provisions of this part, he must refuse such a request unless, and until, an order is issued under section 408(b)(2)(C). Such an order could authorize, but could not, of its own force, require disclosure. If there were no subpoena or other compulsory process, the custodian of the records would have the discretion as to whether to disclose the information sought unless and until disclosure were ordered by means of appropriate legal process, the authority for which would have to be found in some source other than section 408 of the Act. This result is compelled by the language of section 408(b)(2) itself. The words used, "the content of such record may be disclosed . . . if authorized by an appropriate order" are too explicit and too well established as words of art to be interpreted as meaning "the content of such record shall be disclosed if required by an appropriate order."

(b)(1) This interpretation of the permissible scope of a 408(b)(2)(C) order is not only appropriate in the light of the purposes, language, and legislative history of the Act in which it appears, but also is necessary in order to harmonize that section with other legislation dealing with a narrower aspect of the same subject matter. By sections 3(a) and 502 (c) of the Comprehensive Drug Abuse Control and Treatment Act of 1970 (42 U.S.C. 242a(a); 21 U.S.C. 872(c)), Congress conferred on the Secretary of Health, Education, and Welfare and on the Attorney General, respectively, power to authorize persons engaged in drug research to withhold names and other identifying characteristics of persons who are the subject of such research, and expressly provided that when such authority has been obtained, its holder may not be compelled to disclose identifying information "in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings . . ."

(2) If section 408 of the 1972 Act were to be interpreted as an independent grant of authority to compel testimony, it would obviously be in direct conflict with the provisions of the 1970 Act discussed

above. This becomes significant, for example, in the case of medications, which for the purpose of treating opiate addiction on a longer-range basis is classified as an experimental drug which may not be administered except in connection with research. Nothing in either the language or the legislative history of the Act indicates any intent on the part of Congress to amend the provisions of the 1970 Act or to reduce the protection which can be afforded under them. Since the language of section 408 permits, if it does not require, a construction which harmonizes with the 1970 Act, it clearly should not be construed to authorize a court order in derogation of any exercise of the authority of the Secretary of Health, Education, and Welfare under section 242a(a) of title 42, United States Code, or the Attorney General under section 872(c) of title 21, United States Code.

INTERPRETATIVE GUIDELINES FOR APPLICATIONS AND ORDERS UNDER SECTION 408(b)(2)(C)

§ 1401.71 Applications for orders should be restricted to records of specified patients.

Section 408(b)(2)(C) empowers courts of competent jurisdiction to authorize disclosure only on a showing of good cause. That section expressly provides that in assessing whether good cause exists, the court must weight the public interest and the need for disclosure against the injury (a) to the patient, (b) to the physician-patient relationship, and (c) to the treatment services. Because these factors can only be weighted with respect to the particular patient involved, any application for such an order should relate only to the records (or a part thereof) of a specific patient and should include an identification of the patient and an indication whether the application is being made with or without his consent. This conclusion is buttressed by the form of section 408, which appears to have been deliberately cast in terms of the individual patient, e.g. section 408(b)(1), "If the patient . . . gives his written consent . . ." and 408(b)(2), "If the patient . . . does not give his written consent . . .", suggesting an intention that the disclosure order be limited to the records of a particular patient who

either or did not consent to the disclosure.

§ 1401.72 Information which should be furnished in support of application.

In those cases in which an application is not made by or with the consent of the patient, or is not joined in or consented to by the person or organization responsible for the records to which it relates, the Act implicitly requires that such application be supported by adequate information to enable the court to make the following findings:

(a) The nature of the public interest that would be served by granting the application;

(b) Any actual or potential injury, either economic or social, that could result to the patient or to the relationship of the patient to his physician;

(c) The effect that an order of disclosure would have on the administration of the drug-abuse prevention program; and

(d) A clear showing that the interests of the public are substantial in relation to possible injury to the patient or to the patient-physician relationship.

§ 1401.73 Suggested safeguards against unnecessary disclosures.

Section 408(b)(2)(C) implicitly negatives any court order requiring unlimited disclosure when limited disclosure would serve the purpose. It states that "in determining the extent to which any disclosure of all or any part of any record is necessary," the court is required to impose appropriate safeguards against unauthorized disclosure. To facilitate compliance with this requirement, it would be within the intent and spirit of this provision of section 408 that any such court order:

(a) Limit disclosure to those parts of the patient's record deemed essential to fulfill the objective for which the order was granted;

(b) Limit disclosure to those persons whose need for the information is the basis for the order;

(c) Require, where appropriate, that all information disclosed be held in camera; and

(d) Include any other appropriate measures to keep disclosure to a minimum, consistent with the protection of the patient, the physician-patient relationship and the administration of the drug abuse prevention program.

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